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Supreme Court, U.S.

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No. 87-1147

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

VILLAGE OF NEW LENOX,
an Illinois Municipal Corporation,

Petitioner,

v.

**UNION NATIONAL BANK AND TRUST COMPANY
OF JOLIET, as Trustee under Trust Agreement dated August
10, 1970, and known as Trust No. 963, and FERRO
BROTHERS PARTNERSHIP, an Illinois General Partnership,**

Respondents.

**On Petition For Writ Of Certiorari To The Appellate
Court Of Illinois, Third Judicial District**

RESPONDENTS' BRIEF IN OPPOSITION

**JOHN WOODS COUNTRYMAN
COUNTRYMAN, RISSMAN & KRASNER
South Second and Grove Streets
DeKalb, Illinois 60115
(815) 756-8436**

Attorney for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case contains the following inaccuracies and omissions. Petitioner's App. L obviously demonstrates that not all industrial uses specified therein must be conducted wholly within enclosed buildings. Other uses such as railroad freight yards and truck terminals are clearly permitted.

With respect to Count IV of Respondents' complaint, Petitioner's App. G, it should be noted that this Count was a direct attack on the Petitioner's zoning ordinance on its face. It alleged that the zoning ordinance violated state and federal constitutions in that its language is unconstitutionally vague and that it constitutes an unconstitutional delegation of legislative authority to a village employee.

The Appellate Court so ruled in its ruling in favor of this Respondent, a cross-appellant before the Appellate Court, and the Illinois Supreme Court denied the Petitioner's petition for leave to appeal. The Appellate Court also affirmed the entry by the trial court of a judgment in favor of the Plaintiffs.

REASONS FOR DENYING THE WRIT

The petition fails to set forth any matter or grounds as to why this cause should be reviewed by this Court. Rule 17 of the Rules of Practice of the Supreme Court of the United States clearly provides that certiorari will be granted only when there are special and important reasons therefor. Petitioner sets forth no special or important reasons for this cause to be reviewed by this Court and in fact none exist. This cause involved no important questions of federal law, no federal court of appeals decisions, and no state court of last resort has decided a federal question in a way in conflict, with the decision of another such state court or federal court of appeals. The Illinois Appellate Court for the Third District has not decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court.

This cause involved a local zoning ordinance challenged both on the grounds that it violated State of Illinois and United States Constitutions as it was applied to Respondents' property and on its face by its vague language and as an unconstitutional delegation of legislative authority.

There were no new or novel issues presented for review or raised in the Petition. The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on the same basis.

The Petitioner incorrectly perceived the basis of not only Count IV, but also the Appellate Court's ruling which held the zoning ordinance to be violative of both the Illinois and United States Constitutions on its face, in addition to its holding affirming the trial court's decision that the ordinance is unconstitutional as it applied to the Respondents' property in that it violated both state and federal constitutional provisions.

I.

THE DECISION OF THE APPELLATE COURT IS NOT CONTRARY TO ANY DECISION OF THIS COURT.

The Petitioner in fact reveals in its Petition that the Appellate Court relied on the decisions of this Court and applied the rules for determining the unconstitutionally vague provisions of the zoning ordinance.

Count IV of Respondents' Complaint attacked the constitutionality of Petitioner Village of New Lenox's industrial zoning ordinance on its face as a matter of law (App. G-1). The basis of the attack are twofold: that the language of the ordinance is so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at its meaning and guess as to what uses are permitted and what uses are prohibited in the I-1 zon-

ing district; and that the ordinance which delegates to the Petitioner's building commissioner the power to determine which uses are permitted and which are prohibited without any standards, rules or guidelines constitutes an unconstitutional delegation of legislative authority.

Section 10-12-4 (App. L-17) Petitioner Village of New Lenox's zoning ordinance provides as follows:

Section 10-12-4 Certificate Required

No building or structure shall be erected, constructed, reconstructed, enlarged, moved, or structurally altered, nor shall any excavation or grading for any building or structure be done, without a building permit. No building permit, and no other permit pertaining to the use of land, buildings, or structures, shall be issued by an employee of the Village unless the proposed building or structure and the proposed use thereof comply with all the provisions of this Ordinance, nor shall any such permit be issued unless the application for such permit has affixed to it or stamped thereon a certificate of the Building Commissioner certifying such compliance. Any permit or zoning certificate issued in conflict with the provisions of this Ordinance shall be void.

This section delegates to the building commissioner of Petitioner, Village of New Lenox, the power to determine in his sole discretion whether the proposed use of any land complies with all the provisions of the zoning ordinance including whether or not a use is permitted under Section 10-6-2-2 (App. L-2).

Section 10-6-2-2 Uses Permitted

No land shall be used or occupied and no building, structure, or premises shall be erected, altered, enlarged, occupied or used, except as otherwise provided in this Ordinance, for other than one or more of the following specified uses:

1. Industrial Type Uses, *such as but not limited to:*

(a) All manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, cleaning, servicing, testing, packaging and storage of materials, products and goods that can be conducted wholly within enclosed buildings.

(b) Laboratories and research firms involved in the research, experimentation or testing of materials, goods or products.

(c) Printing, publishing or lithography establishments.

(d) Railroad freight yards. (Emphasis added)

The building commissioner also determines what uses are prohibited under Section 10-6-2-6 (App. L-6).

Section 10-6-2-6 Prohibited Uses

All uses not expressly authorized in Sections 6.22, 6.23, 6.24, and 6.25 *including but not limited to:*

1. Residential uses, except as a special use.
2. Drive-in restaurants.
3. Wrecking, dismantling, or automotive salvage yard. (Emphasis added)

The objectionable language which grants to the building commissioner unfettered discretion appears in both sections. Section 10-6-2-2 Uses Permitted Industrial Type Uses, "*such as but not limited to:*"; Section 10-6-2-6 prohibits certain uses "*including but not limited to:*". It is the building commissioner who decides what uses are also permitted in an industrial zone under Section 10-6-2-2 because the list of uses described therein is not complete and he determines what unlisted other uses are permitted. He also has the power to add to the list of prohibited uses because the listed prohibited uses are specifically not complete "*including but not limited to:*". It is therefore the

building commissioner who determines what the zoning law shall be. He can decide what other uses are permitted or prohibited and grant or refuse a permit or zoning certificate under Section 10-12-4.

Men of ordinary intelligence must necessarily guess as to what other uses are permitted and what other uses are prohibited. The language of the ordinance is so incomplete and indefinite as to render it unconstitutionally vague. The ordinance cannot be uniformly applied because the ordinance grants the discretion to the building commissioner. A law vesting discretionary power in an administrative official without properly defining the terms under which his discretion is to be exercised is void as an unlawful delegation of legislative power. *Krol v. County of Will*, 38 Ill. 2d 587, 233 N.E.2d 417, 420 (1968).

The test to determine whether an ordinance is unconstitutionally vague is well established, "whether men of ordinary intelligence must guess at its meaning". *Queenwood East Sheltered Care Home, Ltd. v. Village of Morton*, 94 Ill. App. 3d 51, 418 N.E.2d 472, 476, 49 Ill. Dec. 618 (3rd Dist. 1981). As to what other industrial uses are permitted and as to what other uses are prohibited, men of ordinary intelligence must guess.

II.

THE APPELLATE COURT CORRECTLY FOUND THAT THE PETITIONER'S VILLAGE ORDINANCE WAS DEVOID OF ANY STANDARDS OR CRITERIA TO DETERMINE WHAT USE IS A PERMITTED, SPECIAL OR PROHIBITED USE.

The list of uses which are permitted is left totally open-ended as are the uses which are to be specifically prohibited by expanding each such list of uses to include other nonspecified uses without any criteria or standards.

It then goes on to permit a special use which is similar and compatible to an incomplete list of not only permitted uses but prohibited uses. Special uses may be flexible but similar and compatible to what? The undefined uses permitted under Section 10-6-2-2A are not even limited to those conducted wholly within enclosed buildings. The Appellate Court's decision is not contrary to existing case law.

CONCLUSION

For the foregoing reasons this cause should not be reviewed by this Court.

Respectfully submitted,

JOHN WOODS COUNTRYMAN
COUNTRYMAN, RISSMAN & KRASNER
South Second and Grove Streets
DeKalb, Illinois 60115
(815) 756-8436

Attorney for Respondents